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No. 07-1519

IN THE

SUPREME COURT OF THE UNITED STATES

SYLVIA E. McRAE, Petitioner

v.

SAMUEL L. EVANS, III, Respondent

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR REHEARING

Sylvia E. McRae
Petitioner, pro se
829 Roberts Avenue
Drexel Hill, PA 19026
Telephone: (610) 449-9674
Telephone: (215) 861-8550

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 6, 2008, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. THE GRANT OF CERTIORARI IN KENNEDY v. PLAN ADMINISTRATOR, 497 F.3d 426, U. S. SUPREME COURT, No. 07-636.

Although denying certiorari in the instant case, the Court granted limited certiorari in Kennedy, a case that has as a basis spendthrift trust provisions of trust law. See Restatement (Third) of Trusts, § 58(1), cmt. c at 359 (2003); Restatement (Second) of Trusts, § 36, cmt. c at 100 (1959); 3 Scott & Ascher on Trusts, § 15.1.9 at 933-934 (5th Ed. 2007). The plaintiff in Kennedy wants to establish the supremacy of federal commonlaw over the rules of the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., (ERISA).

In the Kennedy matter, in an amicus curiae brief, the United States refers to the common law of trusts which "serves as ERISA's backdrop," Beck v. Pace Int'l Union, 127 S.Ct. 2310, 2316 (2007), and which "offers a starting point" for interpreting the

statute, Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000). In its brief the United States continues by comparing ERISA's prohibition against assignment or alienation to a trust-law "spendthrift" provision. The United States further describes a spendthrift trust as one that prohibits assignment or alienation of the beneficiary's interest. The only modification a beneficiary can make to a spendthrift trust is to disclaim it, and that is restricted to whether any interest has been accepted and no attempt is being made to direct who the replacement beneficiary might be.

ERISA wisely relies on spendthrift trust limitations to protect the financial interests of beneficiaries. There have been many determinations that the rules of ERISA are dominant in conflicts, such as the conflict in Kennedy. For example, Egelhoff v. Egelhoff, 532 U.S. 141, 147 (2001); Boggs v. Boggs, 520 U.S. 837, 850 (1997). The spendthrift trust provision along with mandated federal jurisdiction, provides a safety net for beneficiaries dependant on ERISA.

In an amici curiae brief filed in Kennedy by the American Benefits Council, the Erisa Industry Committee and the National Association of Manufacturers, 2008 W.L. 2781976 (U.S.) at *14-17, permitting courts to become involved in retirement plan controversies is "clearly not the right answer." That determination is valid in the instant case: permitting a court to change a decedent's trust (the equivalent of a retirement plan) to the point of destruction is clearly not right. The amici curiae brief states at *29 "....any benefit disbursements must be made in accordance with existing written plan

provisions, including those with respect to beneficiary designations."

Written specific instructions are the best criteria in any controversy. In "The Philadelphia Inquirer," October 8, 2008 at p. A11, two U.S. Supreme Court Justices are quoted:

> ....DuPont's retirement plan says 'that if you want to change the beneficiary, here's how you've got to change the beneficiary,' Chief Justice John G. Roberts, Jr., said. 'We just have no way of knowing' what William Kennedy intended, Justice Ruth Bader Ginsburg said.

In the instant case, what decedent wanted for her son (appellee) is explicit. (App. 1) Her wishes were reiterated by the drafter of her will in a deposition: "something to the effect of him being able to get his hands on the - I think it was the money from the house or something, that he might waste it, and she wanted to make sure he was taken care of."

In this case, the judicial system is modifying the trust as to restrictions and trustee, not just changing the decedent's wishes, but ignoring law that governs trusts.

If the law that governs trusts is being used to adjudicate a case related to inheritance, and that case is granted certiorari, then it follows that in the instant case, certiorari should be granted when that law is being ignored.

2. MEDICAID (42 U.S.C. § 1396, et seq.) AS A SAFETY NET FOR SPENDTHRIFT TRUST.

After a hearing in South Carolina District Court, petitioner was advised that the testamentary trust was "gone." When petitioner asked, "What will become of my brother?" the answer was "He can go on Medicaid."

Medicaid is a federally-funded program for low-income persons. It is not designed to permit modification of wills and/or trusts.

South Carolina Code § 62-7-502(b) defines a spendthrift trust as "a term of a trust providing that the interest of a beneficiary is held subject to a 'spendthrift trust,' or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary interest."

But there are exceptions to a spendthrift provision under South Carolina Code § 62-7-503(c):

> (c) The exception in subsection (b) [child support orders] is unenforceable against a special needs trust, supplemental needs trust, or similar trust established for a disabled person if the applicability of such a provision could invalidate such a trust's exception from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if the applicability of such a provision has the effect or potential effect of rendering such disabled person ineligible for any program of public

> benefit, including but not limited to, Medicaid and SSI.

This shows there is legal consideration given to trusts vis-a-vis Medicaid.

However, a new phenomenon, since the Petition for Writ of Certiorari was filed with the Court, is the forecast of massive governmental deficits. The federal government may not be able to fund the safety net programs it has in place now. Reliance on such programs and not attempting to hold together a spendthrift trust for the benefit of appellee would be a dereliction of fiduciary duty.

However, the probate court has attempted to destroy the nature of the trust by removing all restrictions in the trust and the named trustee (petitioner) and ignoring the testatrix' named substitute trustee. This action is contrary to South Carolina Code 62-7-704(c) relative to the appointment of a successor trustee which states:

> (c) a vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:
> (1) by a person designated in the terms of the trust to act as successor trustee...
> (3) by a person appointed by the court.

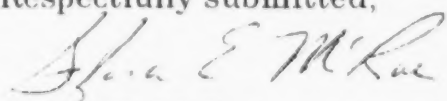
The testatrix in the instant case was not attempting to find someone to inherit money; she was attempting to protect her son. The will states this fact; the drafter of the will confirms it. There is parental concern in this case, not unlike the concern recognized

by this Court in Winkelman ex rel. Winkelman v. Parma City School District, 127 S.Ct. 1994 (U.S., May 21, 2007)(No. 05-983). The Justices, in this case, permitted parents of children with special needs to file suit directly to the Supreme Court and no counsel was necessary. The parents' concern for their children was more important to the Justices than the litigation representation requirement. Here there is also parental concern and petitioner stands in place of the testatrix who is attempting to protect her son.

CONCLUSION

The Court is considering the Kennedy case and the spendthrift trust basis to ERISA, which relate to this case as inheritance matters. The federal government, due to anticipated deficits, may not now be able to maintain safety net programs for persons who have lost inherited funds. For these reasons, as well as those contained in the petition for writ of certiorari, petitioner requests that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,



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Petitioner, pro se
829 Roberts Avenue
Drexel Hill, PA 19026
Tel. (610) 449-9674 home
Tel. (215) 861-8550 office

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v.

SAMUEL L. EVANS, III, Respondent

CERTIFICATION OF PETITIONER

I hereby certify that this Petition for Rehearing is made in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2008.

Sylvia E. McRae, Petitioner
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CERTIFICATION OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 1298 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2008, three copies of the Petition for Rehearing were mailed, U. S. mail, postage prepaid, to the following party:

Samuel L. Evans, III
1105 Southgate Drive
Charleston, SC 29407
Respondent

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2008.

Sylvia E. McRae

Sylvia E. McRae, Petitioner
829 Roberts Avenue
Drexel Hill, PA 19026
Tel: (610) 449-9674
Tel: (215) 861-8550

APPENDIX

(Trust Excerpt from)
LAST WILL AND TESTAMENT OF
GLADYS RUTH EVANS

SEVENTH: I give, devise and bequeath all of my interest in my home and lot at 1105 Southgate Drive, Charleston, SC, as follows:

a. To my son, Samuel Luther Evans, III, a life interest to live in and reside in and on my real property at 1105 Southgate Drive, Charleston, SC for so long as he resides there as his principal residence and domicile, and so long as he maintains it, with the remainder at his death or abandonment I give and devise in fee simple absolute to my granddaughters, Anne Carter McRae and Mary Evans McRae, their heirs and assigns, provided they survive me. If they do not survive me, then their issue shall take his or her parent's share per stirpes and if said grandchild has no children then the surviving grandchild named above shall take the deceased grandchild's share.

EIGHTH: I give, devise and bequeath 30% of all the rest, residue and remainder of my estate, real or personal, wheresoever situate and of whatsoever nature, of which I may die seized and possessed, or to which I may be entitled to in any way whatsoever at the time of my death, whether acquired before or after the execution of this, my Last Will and Testament, unto my daughter, Sylvia Evans McRae, as Trustee, upon the uses and trust and upon the

terms and conditions hereinafter set out.

a. My Trustee shall hold the property in trust for the benefit of my son, Samuel Luther Evans, III, and shall be authorized to use so much of the income and to encroach upon the corpus in her sole discretion to provide for the proper support of my surviving son, Samuel Luther Evans, III. The Trustee shall not be required to make any payment for the support of my son from the corpus unless in the sole judgment of the Trustee my son is unable to support himself.

b. Said Trust shall terminate when my son shall die. Upon said termination, the Trustee shall divide the property then remaining in her hands into equal shares for my granddaughters, Anne Carter McRae and Mary Evans McRae, surviving me and if they are not surviving me then they shall divide it into equal shares for the issue of the deceased granddaughters aforesaid then living.

c. If at any time before the final distribution of this trust all of the beneficiaries herein named or described should die and there should be no such beneficiary or beneficiaries to take the property or income therefrom or if my son shall have predeceased me, then, and in that event, the property in the hands of my Trustee shall be distributed to my granddaughters, Anne Carter McRae and Mary Evans McRae, their heirs and assigns in equal shares per stirpes.

d. Should Sylvia Evans McRae be unable or unwilling to serve as Trustee or Trustees upon the

uses and trusts and upon the terms and conditions aforesaid, then I hereby nominate, constitute and appoint as alternate Trustee, Mary Evans McRae.

NINTH: Whenever my Trustee in his or her sole discretion shall determine that the size of any find or trust corpus he or she holds does not warrant the cost of continuing such fund and trust, or its administration would be impractical for any other reason, my Trustee without further responsibility, may pay over, transfer and distribute such fund or trust or the income therefrom, to my son and my Trustee shall be discharged with respect thereto.